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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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THE DURIRON COMPANY, INC., *Petitioner*

v.

CHARLES STEPHENSON, NORMAN BAKKE, ET AL.,
*Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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*To The Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, The Duriron Company, respectfully prays for the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Alaska, entered May 3, 1965.

## I

## OPINION BELOW

The decision of the Superior Court, Third Judicial District, of the State of Alaska, is unreported. A copy of the order declaring that the Court had no jurisdiction over petitioner is printed in the Appendix 14a-17a. The opinion of the Alaska Supreme Court is reported at 401 P. 2d 423 (1965), and may be found in the Appendix 1a-14a.

## II

## GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the Alaska Supreme Court was entered on May 3, 1965. Rehearing was denied on June 15, 1965. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1257 (3).

Petitioner is aware of the jurisdictional requirement of finality contained in 28 U.S.C. 1257 (3). It is clear, however, that the judgment in this case is final within the interpretation of that requirement. *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555, 558 (1963) and *Local No. 438, Construction and General Laborers' Union* v. *Curry,* 371 U.S. 542, 548-50 (1963).

## III

## QUESTION PRESENTED

This case was initiated in the state of Alaska as an action grounded in tort. Petitioner, an Ohio manufacturer of pipes and valves: (1) has never had an office, salesman, agent, servant or employee in the state; (2) has never been authorized to do business, nor, in fact, has ever transacted any business in the

state; and (3) for the five years preceding the action had only a fraction of 1% of its total gross sales entering the state by direct and indirect means. In these circumstances, does not the assertion of *in personam* jurisdiction over petitioner offend our "traditional notions of fair play and substantial justice" and thereby violate due process under the standards established by this Court in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) and *Hanson* v. *Denkla,* 357 U.S. 235 (1958)?

## IV

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution—14th Amendment, Par. 1:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Section 10.05.642 of the Alaska Statutes:

> When a foreign corporation authorized to transact business in the state, or not authorized to transact business in the state but doing so, fails to appoint or maintain a registered agent in the state . . . the commissioner is an agent upon whom process, notice or demand may be served. Service on the commissioner shall be made by delivering to and leaving with him, or with a person designated by him in the corporation department of his office, duplicate copies of the process, notice or demand. The commissioner shall immediately have one copy forwarded by registered or certified mail, addressed to the corporation at its principal office in the state or country under whose laws it is incorporated.

## V

## STATEMENT OF THE CASE

Petitioner, Duriron Company, a New York corporation with headquarters in Dayton, Ohio, is principally engaged in the manufacture and sale of corrosion-resistant iron alloy pipes and fittings. (App. 4a). Although the company maintains various sales offices throughout the country, no agent has ever entered the state of Alaska to solicit or consummate the sale of any of petitioner's products. Moreover, the company is not authorized to transact business in Alaska and therefore does not have an agent registered in that state for receipt of service. (App. 4a)

This case[1] was initiated by respondents for personal injury and property damage caused by an alleged explosion of escaped gas. (App. 2a) Petitioner was made a party defendant on the basis of allegations that it manufactured a valve which allegedly failed to meet requirements specified by the purchaser. (App. 2a) Subsequent to filing their complaint, respondents, pursuant to Section 10.05.642 of the Alaska Statutes,[2] caused process to be served on petitioner at its offices in Dayton and in New York. Duriron immediately made

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[1] Two separate complaints were filed. These were consolidated by the trial judge and have at all times been treated as one. Various amended complaints were also filed, which, for purposes of the present petition, are of no import.

[2] Providing, *inter alia*, that "when a foreign corporation . . . not authorized to transact business in the state but doing so, fails to . . . maintain a registered agent in the state . . . the Commissioner is an agent upon whom process . . . may be served. . . . The commissioner shall immediately have one copy forwarded by registered or certified mail, addressed to the corporation at its principal office in the state or country under whose laws it is incorporated."

a special appearance in the trial court (R. (1) 85, 106a; R. (2) 77, 93)[3] to contest its amenability to substituted service on the basis that it had never "transacted business" in the state as required by the statute. The contention was also made that if the attempted service was upheld, the resulting finding that the courts of Alaska were vested with jurisdiction over petitioner would deprive it of rights guaranteed by the due process clause of the fourteenth amendment and the interstate commerce clause of the Constitution.[4] (R. (1) 86, 106b; R. (2) 78, 94).

The trial court found for the petitioner. On appeal, however, the Alaska Supreme Court reversed, finding that "no violation of due process [would] . . . result from requiring it [petitioner] to defend" the suit. (App. 14a). A timely motion for rehearing (specifically objecting to the decision as not being in accordance with decisions of this Court)[5] was denied (Rec. (2) 133).

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[3] Due to the consolidation of the cases there are two separate files. See note 1 *supra*. The number placed in parentheses indicates the file in which cited material may be found.

[4] Petitioner contended: [T]he court is not vested with jurisdiction over the Duriron Company, Inc. and process or orders in contravention of the rights of said foreign corporation

(i) will impose a burden upon commerce among the State in violation of Article 1, paragraph 8, clause 3, of the Constitution of the United States, and

(ii) will deprive the Duriron Company, Inc. of its property, without due process of law, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

[5] "Further, appellee contends that the court has . . . misapplied the requirement of continuous and systematic . . . as required by *International Shoe*." R. (2) 130.

The facts are not in dispute. During the five years preceding the instant action petitioner's business contacts with the state were measured in fractions of one percent of total sales. Products which reached the state by direct and indirect means, *i.e.*, sales to independent businesses located outside the state which purchased petitioner's products for resale to businesses in the state, were, as compared to gross sales; 443/10,000ths of 1% in 1958; 508/10,000ths of 1% in 1959; 891/10,000ths of 1% in 1960; 462/10,000ths of 1% in 1961; and 265/10,000ths of 1% in 1962. Included in these figures are five unsolicited orders from three Alaska residents and a facility of the United States Air Force based in Alaska which, for the five years in question, represented 93/10,000ths of 1% of the gross sales of the company. (App. 16a; R.(1) 72-6; R. (2) 66-70).

The transaction which gave rise to the sale of the specific valve in question is included in the foregoing. Delta Engineering Company, acting as an agent of Anchorage Natural Gas Corporation, ordered the valve along with other merchandise from the Vinson Supply Company, located in Houston, Texas. Acting as an independent contractor, Vinson had ordered the valve from Duriron for resale. The invoice indicates that the valve was sent directly to Anchorage Natural Gas Corporation in Anchorage, Alaska. (App. 6a). The place of sale was considered to be Dayton, Ohio. (R. (2) 34).

Also important to the factual background of the case are the activities of the Seattle office of the Duriron Company and the activities of John T. Doherty & Associates, a manufacturer's representative located in the same city. Doherty represented petitioner and at least four other similar manufacturers. (Walter K.

Ramage Dep. 3).[6] Although Doherty was authorized to handle a substantial number of products manufactured by petitioner, it had no authority to make quotations or solicit business for any of Duriron's valve products. (Walter K. Ramage Dep. 16; Warran Bays Dep. 26). Moreover, Doherty's sole activity for the benefit of Duriron in Alaska was the mailing of company catalogs (stamped with Doherty's name) to interested persons and the sending of price quotations to two Anchorage jobbers.[7] (Walter K. Ramage Dep. 8, 10). Directly representing Duriron in the sale of its valves was its Seattle office. During the period in question it had no business contacts with the state of Alaska. (Warran Bays Dep. 18, 23-4).

In accordance with these facts the trial court found that Duriron was neither physically nor constructively engaged in business in the state and therefore not subject to service of process.[8] The Alaska Supreme Court, however, stated that "the fact that some of the pur-

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[6] Various depositions were taken pursuant to the motion to quash. They are included as part of the record.

[7] Any orders which resulted from these activities were forwarded to Duriron for approval.

[8] The court stated, *inter alia*:

"3. That from the year 1958 to the present time, Independent Contractors, in the furtherance of their own interests and from places of business located outside the State of Alaska, purchased merchandise of the Duriron Company, Inc., and said Independent Contractors thereafter resold the merchandise and shipped or caused the merchandise to be shipped to persons in Alaska;

4. That during the period of five years, 1958 through 1962, three Alaska residents and a facility of the United States Air Force, based in Alaska, mailed five unsolicited orders for goods from the Duriron Company, Inc., which merchandise was

chases were made from independent middlemen or that someone other than the manufacturer caused the product to be shipped into the state are not controlling factors." (App. 13a). With this as a basic premise, the Alaska Supreme Court relied on a recent decision by the Illinois Supreme Court which held "that the use of . . . products in the ordinary course of commerce is sufficient contact with [a] . . . state to justify" a foreign corporation being subjected to the jurisdiction of its courts in an action arising out of injury caused by the product." *Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 436, 176 N. E. 2d 761, 766 (1961). On this basis the court found what it considered to be the requisite jurisdictional facts. To further bolster this conclusion the court stated:

> In the case before us the allegedly defective valve manufactured by Duriron, was installed in the gas mains of Anchorage . . . The explosion occurred at or very near the place of the installation. All of the other defendants . . . are located in Anchorage. Most of the witnesses who would testify concerning the allegedly defective valve and its installation and operation with relation to a claimed lack of certain required couplings are

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furnished by Duriron and represented 93/10,000ths of 1% of the Duriron Company, Inc., during said five-year period;

5. That orders for merchandise of the Duriron Company, Inc., required acceptance outside the State of Alaska before becoming contracts which are binding on the Duriron Company, Inc.;

6. That no agent, servant or employee, acting in the course and scope of employment by the Duriron Company, Inc., entered the State of Alaska or the Territory of Alaska at any time heretofore, to solicit or consummate the sale of any products by the Duriron Company, Inc., to any person in the State of Alaska; . . . ." (App. 13a-16a).

located in this area. It would appear to be far more convenient to Duriron to defend the suits in Alaska than to defend in Ohio and transport all of the witnesses to that state from Alaska. The convenience of the plaintiffs is likewise better served by trial in Alaska for the same reason. (App. 14a-15a).

## VI

## REASONS FOR GRANTING THE WRIT

### 1. The Alaska Supreme Court Has Decided a Federal Question of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court

This case involves a matter of great public concern, a matter of importance not only to your petitioner but also to all manufacturers throughout the United States. The Alaska Supreme Court, in finding jurisdiction over the petitioner, has extended its judicial power far beyond the applicable decisions of this Court.

In *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), the record clearly demonstrated that in the State of Washington a foreign corporation had eleven to thirteen salesmen under the direct supervision and control of the company earning commissions based on the amount of their sales. This Court held that the state had jurisdiction over the corporation in an action to recover payments due to an unemployment compensation fund. In deciding that the activities were sufficiently continuous and systematic within the limitations imposed by the due process clause, a new qualitative test was invoked which stressed the reasonableness of requiring the nonresident to defend the particular suit:

> [D]ue process requires only that in order to subject the defendant to a judgment *in personam,* if he be not present within the territory . . . he have

> certain *minimum contacts* with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." . . . Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, *in the context of our federal system of government,* to require the corporation to defend the particular suit which is brought there. 326 U.S. at 316-17. (Emphasis added.)

In 1957, this test was seemingly broadened by the decision of *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957). In deciding that a single contract of insurance made by a nonresident corporation with a resident of California was a sufficient "contact" with the state to sustain jurisdiction, the Court relied upon the "clearly discernible" trend toward expanding the permissible scope of state jurisdiction over foreign corporations—noting specifically the fact that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U.S. at 223.

The broad, all-inclusive language contained in the decision was substantially qualified in that same term, however, by *Hanson* v. *Denkla,* 357 U.S. 235 (1958). In deciding that Florida had no jurisdiction over a Delaware trust company which carried on no activities within the state, *McGee* was distinguished on its facts. Moreover, the majority of this Court specifically reinforced the holding in *International Shoe* by requiring that "there be some act by which the defendant *purposefully avails itself* of the privilege of conducting activities within the forum State, thus invoking the

benefits and protections of its laws" 357 U.S. at 253. (Emphasis added.) Moreover, an earlier dictum in *International Shoe* indicating a parallel between *forum non conveniens* and the appropriate place of trial under the due process clause was rejected: A state court "does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." 357 U.S. at 254.

> Those restrictions [on *in personam* jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. 357 U.S. at 251. (Emphasis added.)

Against the requirements stated in the decisions of this Court, the Supreme Court of Alaska could never have based its finding of jurisdiction on the inconsequential activities of petitioner[9] as shown in the record. Rather, the decision reflects a clear evasion of this problem in favor of what amounts to a declaration of *per se* jurisdiction on the basis of: (1) the fact that the product causing injury was placed into the "stream of commerce"; and (2) an "estimate of conveniences"—Alaska being found to be the most convenient forum.

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[9] It should be noted that the court substantiated the decision with completely irrelevant facts, *i.e.*, that subsequent to the time the complaints were filed: (1) Doherty followed the practice of sending a representative to Alaska; and (2) the branch office of Duriron expanded its sales district to include Alaska.

This Court is yet to intimate that the mere act of placing goods into commerce, in and of itself, is sufficient to give a state jurisdiction over a foreign corporation if the manufactured product causes injury within a forum state. *Cf. American Oil Co.* v. *Neill,* 380 U.S. 451 (1965). *McGee* is by far the most liberal extension of the due process clause—sustaining jurisdiction when the sole contact forming the basis of jurisdiction was the making of an insurance contract with a resident. As noted, however, the decision was distinguished on its facts by *Hanson, and every distinguishing factor noted in the latter decision is present in the instant case.*

First, the Court in *Hanson* noted that the cause of action in *McGee* arose out of a transaction having its situs in the forum state, *i.e.,* the insurance contract was consummated in California. In the instant case it is undisputed that the specific valve in question was sold to an independent contractor in Houston, Texas, which, acting for its own businesses purposes, purchased the valve for resale. Therefore, the physical aspects of the sale had no connection with the State of Alaska.

Second, the Court in *Hanson* found that in *McGee* the nonresident defendant solicited the insurance agreement with the California resident. In contradistinction to this, the record in this case demonstrates that *not only* was there a lack of solicitation by petitioner in the State of Alaska related to the sale of the valve in question—but *further* that at no time had there been solicitation activities related to *any* of petitioner's valve products conducted in the state.

Finally, the Court in *Hanson* found that a relevant consideration in *McGee* was the fact that the State of

California had manifested its interest in providing effective redress for its residents when nonresident insurers refused to pay claims on insurance they have solicited in the state by enacting special legislation (The Unauthorized Insurers Act). Although it could be argued in the instant case that the state has a "special interest" in tortious injuries incurred by its residents which is comparable in degree to its interests in protecting residents from foreign insurers, no special legislation has been enacted by the State of Alaska which specifically embodies this interest. Rather, we are dealing with an ordinary substituted service statute providing for service on foreign corporations "transacting business" in the state.

The decision, therefore, can find no justification under the broad language of *McGee*. Moreover, and of utmost importance, it flatly contradicts the standards for *in personam* jurisdiction as set forth in *Hanson*. There is not the slightest suggestion that Durion has ever availed itself of the "benefits and protections" from the laws of Alaska. At no time did it permit any of its officers, agents, servants or employees to enter the state for purposes of solicitation; every sale made which resulted in its products entering the state was either to independent businesses located outside its territorial confines or to businesses therein which placed their orders without benefit of solicitation by petitioner; and no solicitation activity was undertaken for the sale of any of its valve products.

The only activity that could possibly be considered as solicitous was the sending of catalogs into the State of Alaska by Doherty, the manufacturers' representatives located in Seattle. The thinness of this reed is

reflected by the fact that the Alaska Supreme Court was unable to make it the determinative factor in the case. Doherty had no authority to solicit sales for Duriron's valve products; it sent the catalogs only to interested persons; and the catalogs were sent under Doherty's own auspices, i.e., with its name stamped on the outside cover. Moreover, little need be said concerning the "continuous and systematic" quality of the activity. The record fails to bear out the fact that "substantial" business was generated thereby. Furthermore, although the amount of Duriron products finding their way into the state was measured in fractions of one percent of gross sales, during the last two years in question total sales were *decreasing*. This fact bears out the effectiveness of Doherty's activities.

Finally, there is no substance in the proposition by the court below that due process boundaries may be extended by the "estimate of conveniences" test. No one can dispute that Alaska is the most convenient forum for litigation. As noted, however, the majority of this Court in *Hanson* specifically rejected this factor as a consideration. It therefore has no legal justification.

**2. Due Process Requirements in the Context of a Foreign Corporation's Amenability to Process in Actions Grounded in Tort Is a Question of Substantial Importance Subject to Divergent Views Throughout the States Which Should Be Definitively Resolved by This Court**

The question of states' jurisdiction over foreign corporations has always been difficult. Under the decisions of this Court a bewildering variety of standards have resulted,[10] and in the field of tort actions there has developed a growing abuse of jurisdictional power.[11] This case is a classic example of such abuse.

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[10] Since the expansion of the jurisdictional concept from "doing business" to "minimum contacts" various state legislatures have passed substituted service statutes purporting to exploit the due process clause to its fullest extent. See, *e.g.*, Minn. Stat. § 303.13 (13) (Supp. 1964); Vt. Stat. Ann. tit. 12 § 855 (1958); Tex. Rev. Civ. Stat. Art. 2031(b)(4) (1961) (rendering a corporation liable for torts committed "in whole or in part" within the forum state). Connecticut renders a corporation amenable to process for "tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance." Conn. Gen. Stat. Rev. § 33-411(e) (1961). See also Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1956). Other states have found revision of their statutes unnecessary; the courts interpreting the existing statute to permit full utilization of jurisdictional power. See, *e.g.*, *Cosper* v. *Smith & Wesson Arms Co.*, 53 Cal. 2d 77, 346 P. 2d 409 (1959).

[11] Exemplifying the ultimate result of disregarding the pronouncements of this Court requiring corporate activity in a state prior to its exertion of jurisdiction is *Anderson* v. *Penncraft Tool Co.*, 200 F. Supp. 145 (N.D. Ill. 1961). Pursuant to the *Gray* decision, the court concluded that there was jurisdiction in all instances over foreign corporations whose products caused injury in the state unless it was shown that it was not "contemplated" that the product would be used in Illinois. Minnesota is essentially in accord *Ealers* v. *U.S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 124 N.W.2d 824 (1963).

Seven years have elapsed since this Court's decisions in *Hanson* and *McGee*. Their impact upon a state's constitutional power to submit foreign corporations to jurisdiction is yet to be clearly delineated,[12] and a substantial number of state courts interpreting state service or process statutes which purport to go

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[12] Those states which hold that the mere introduction into commerce of a product is sufficient to sustain jurisdiction when injury is caused within the forum state rely explicitly on *Gray* and its emphasis on the *McGee* case. *Cf., Wisconsin Metal & Chemical Corp.* v. *DeZurik Corp.*, 222 F. Supp. 119 (E.D. Wis. 1963), where the court specifically rejected a contention that *McGee* should be viewed with the special interest of the state in mind. Thereafter, the court proceeded to limit *Hanson*. Other courts view the question differently.

In *Dooly* v. *Payne*, 326 F. 2d 941, 943 (CA 5, 1964), it is stated: "The McGee case was followed in the same term by Hanson . . . which teaches that, although the door of non-resident jurisdiction has been opened wider by International Shoe and McGee, it has not been removed from its hinges and that it is stated to be the rule that 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' "

In *Webb* v. *Stanker & Galetto, Inc.*, 84 N.J. Super. 178, 201 A. 2d 387 (1964), the court refused to recognize the expansion in other jurisdictions of the due process concept and stated that the furtherest extension of jurisdiction based on isolated activities was in the insurance field, citing *McGee*. In the same year *Essential Constr. Co.* v. *Royal Concrete Fireproofers, Inc.*, 84 N.J. Super. 289, 201 A. 2d 754 (1964) was decided. This case noted that although the cause of action arises in the state it is not determinative unless there are other contacts sufficient to support jurisdiction. See also, *Moore-McCormack Lines, Inc.* v. *Bunger Corp.*, 307 F. 2d 910 (CA 4, 1962); *Devany* v. *Rheem Mfg. Co.*, 319 F. 2d 124 (CA 2, 1963); *O'Brien* v. *Comstock Foods, Inc.*, 194 A. 2d 568 (Vt. 1963); *Jupp* v. *Global Marine Exploration Co.*, 227 F. Supp. 604 (E.D. La. 1964); *Lone Star Motor Import, Inc.* v. *Citron Cars Corp.*, 185 F. Supp. 48 (S.D. Tex. 1960) (specifically noting the conflict on this point).

the "constitutional limit" are in direct conflict with the decision by the Alaska Supreme Court.[13]

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[13] The District Court in Connecticut refused to abandon, in the absence of a showing of sufficient corporate contacts, the state conflicts of laws rule that a tort is committed where the negligence first occurs. *DiMeo* v. *Minster Mach. Co.*, 225 F. Supp. 569 (D. Conn. 1963). A decision from West Virginia is in accord. *Mann* v. *Equitable Gas Co.*, 209 F. Supp. 571 (N.D. W. Va. 1962). New York has recently held that although its statute and the Illinois statute are similar, a foreign corporation in that state is only amenable to process when a tortious act is committed in the state—other contacts lacking. On the basis of legislative intent the *Gray* analysis—which abandons the distinction as to where a tort is "committed" was rejected. *Feathers* v. *McLucas*, 33 U.S.L.W. 2649.

The courts of Florida, although their statute goes to the full extent permitted by the due process clause, *Del Ray Beach Aviation Corp.* v. *Mooney Aircraft*, 332 F. 2d 135 (CA 5, 1964), have refused to take jurisdiction over foreign corporations unless corporate activities are clearly demonstrated by the record. *Newark Ladder & Bracket Co.* v. *Eadie*, 125 So. 2d 915 (Fla. Dist. Ct. App. 1961); *Cooke-Waite Lab., Inc.* v. *Napier*, 166 So. 2d 675 (Fla. Dist. Ct. App. 1964).

The Louisiana interpretation of its statute is that it goes to the permissible limits of the due process clause. *Buckley* v. *New York Times*, 338 F. 2d 470 (CA 5, 1964), but the requirement is still retained that a plaintiff allege and prove corporate activity in the state sufficient to give the court jurisdiction. *Jupp* v. *Global Marine Exploration Co.*, 227 F. Supp. 604 (E.D. La. 1964) (noting that the percentage of business of defendant corporation was on the increase each year); *Nigro* v. *Eagle Star Ins. Co.*, 216 F. Supp. 205 (E.D. La. 1963) (dismissing on the basis that no jurisdictional facts were alleged and proved). Vermont is in accord. *O'Brien* v. *Comstock Foods, Inc.*, 194 A. 2d 568 (Vt. 1963). *Cf.*, *Hearne* v. *Dow-Badische Chem. Co.*, 224 F. Supp. 90 (S.D. Tex. 1963).

North Carolina, in a case directly comparable with *Gray*, refused jurisdiction on due process grounds. *Moss* v. *City of Winston Salem*, 254 N.C. 480, 119 S.E. 2d 445 (1961).

Michigan like many other states holds that its statute is a codification of *International Shoe* and requires continuous solicitation. *Donley* v. *Whirlpool Corp.*, 234 F. Supp. 869 (E.D. Mich. 1964). Alabama is comparable. *Dooly* v. *Payne*, 326 F. 2d 941 (CA 5, 1964).

Some opinions have included a specific request for clarification of the constitutional standards by this Court. For example, in *Pendzimas* v. *Eastern Metal Prods. Corp.*, 218 F. Supp. 524 (D. Minn. 1961), the issue was presented whether a foreign manufacturer of electric cookers was subject to service of process on the basis that one of its products caused injury in the state. The corporation had no officers or agents in the state and no evidence was presented concerning the amount of business done therein. After noting that under Minnesota law the defendant would be subject to the jurisdiction of the court, the district judge refused to follow state law on the basis that it would deprive the corporation of its rights under the due process clause. In dismissing the case he concluded "with the hope that this matter may reach the Court of Appeals and ultimately the Supreme Court so that the question finally may be set to rest." 218 F. Supp. at 529-30.[14]

It is clear that the present case and some of the other recent decisions of state courts have moved to the point of establishing an all-inclusive jurisdiction over foreign corporations in almost total disregard of the due process clause. The results are an abuse of judicial process, forum shopping and a multiplicity of vexatious suits which can be resolved only by the au-

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[14] This decision has resulted in a direct conflict in the judicial district. See *Williams* v. *Connolly*, 227 F. Supp. 539 (D. Minn. 1964). The Supreme Court of Minnesota, in determining that there was jurisdiction over a foreign manufacturer of boilers, specifically noted that this Court has failed to define the constitutional standards applicable in a tort action. *Ehlers* v. *U. S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 61, 124 N.W. 2d 824, 827 (1963). Other decisions expounding the difficulties in this area are numerous. See *e.g.*, *Green* v. *Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117, 126 (S.D. Ind. 1962); *Curtis Pub. Co.* v. *Cassel*, 302 F. 2d 132, 135 (CA 10, 1962).

thoritative decision of this Court. This is the problem to which Judge Sobeloff referred so pointedly a few years ago:

> If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction. Individual states could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known.[15]

Without the decisive guidance of this Court the conditions typified by this case will grow in seriousness and harmful effect.

## CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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*Of Counsel:*

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[15] ***Erlanger Mills, Inc.*** **v.** ***Cohoes Fibre Mills, Inc.,*** **239 F. 2d 502, 509 (CA 4, 1956).**

# APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 482

CHARLES STEPHENSON, ET AL., *Appellants,*

v.

THE DURIRON COMPANY, INC., *Appellee,*

and

NORMAN BAKKE, ET AL., *Appellants,*

v.

THE DURIRON COMPANY, INC., *Appellee.*

## Opinion

[No. 289—May 3, 1965]

Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage,
Edward V. Davis, Judge.

Appearances: John M. Savage, Clark and Savage, Anchorage, for Appellants. Robert C. Ely, Ely, Guess, Rudd and Havelock, Anchorage, and P. Eugene Smith, Marshall and Smith, Dayton, Ohio, for Appellee The Duriron Company, Inc.

Before: Nesbett, Chief Justice, Dimond and Arend, Justices.

NESBETT, Chief Justice.

The single question before us is whether the appellee foreign corporation has transacted business in Alaska within the meaning of that term as defined by this court in

*Northern Supply, Inc.* v. *Curtiss-Wright Corporation*[1] and as defined by accepted authorities.

On March 16, 1962, the appellant Stephenson switched on a light in his apartment which set off an explosion of escaped gas. The apartment house burned to the ground. Appellants sued for personal injuries and property damage caused by the explosion and fire. The number of defendants was expanded until it included the supplier of the gas, the supervisors and contractors who installed the pipeline and the manufacturer of the allegedly defective valve.

This appeal concerns only the defendant The Duriron Company, Inc., manufacturer of the valve claimed to have permitted the gas leak which caused the explosion.

In *Northern Supply, Inc.* v. *Curtiss-Wright* we recognized that Alaska's corporation act was patterned after the Model Business Corporation Act and pointed out that AS. 10.05.600 of Alaska's act, which names certain business activities that a foreign corporation may engage in without being considered to be transacting business in the state,[2] was intended to pertain only to the transaction of business as it relates to the power of the state to require the foreign corporation to obtain a certificate of authority. We emphasized that AS 10.05.600 does not purport to define those activities which may subject a foreign corporation to

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[1] Opinion No. 271, 397 P. 2d 1013 (Alaska 1965).

[2] AS 10.05.600 in pertinent part states:

> Without excluding other activities which may not constitute transacting business in the state, a foreign corporation does not transact business in the state by carrying on any of the following activities: . . .
>
> (5) effecting sales through independent contractors; . . .
>
> (9) transacting business in interstate commerce;
>
> (10) conducting an isolated transaction completed within a period of 30 days not in the course of a number of repeated transactions of like nature.

the jurisdiction of Alaska's courts under the provisions of AS 10.05.642.[3] We said that a foreign corporation could very well be transacting business of such a nature that it was not required to obtain a certificate of authority under AS 10.05.600 but that the same business could be sufficient under AS 10.05.642 to subject the foreign corporation to the jurisdiction of Alaska's courts. We construed the words "transact business" in AS 10.05.642 as encompassing all those activities which would subject a foreign corporation to the jurisdiction of our courts when measured by the outer limits of the due process clause of the federal constitution.[4]

The facts must now be examined to determine whether The Duriron Company, Inc., had sufficient contact with Alaska so as to make it reasonable and just, according to the traditional conception of fair play and substantial justice that Alaska should exercise jurisdiction after service of process on the Commissioner of Commerce who in turn

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[3] AS 10.05.642 states:

> When a foreign corporation authorized to transact business in the state, or not authorized to transact business in the state but doing so, fails to appoint or maintain a registered agent in the state, or when a registered agent cannot with reasonable diligence be found at the registered office, or when the certificate of authority of a foreign corporation is suspended or revoked, the commissioner is an agent upon whom process, notice, or demand may be served. Service on the commissioner shall be made by delivering to and leaving with him, or with a person designated by him in the corporation department of his office, duplicate copies of the process, notice, or demand. The commissioner shall immediately have one copy forwarded by registered or certified mail, addressed to the corporation at its principal office in the state or country under whose laws it is incorporated. Service on the commissioner is returnable in not less than 30 days.

[4] Northern Supply, Inc. v. Curtiss-Wright Corp., *supra* note 1, at 1016-17.

served appellant by mail, and force Duriron to defend against plaintiffs' claims for relief in Alaska's courts.

Duriron is a New York corporation with headquarters in Dayton, Ohio, and is engaged in the manufacture and sale of corrosion resistant iron alloy pipes and fittings. Duriron products are distributed throughout the United States by the use of district sales offices, manufacturer's representatives and plumbing jobbers. It is not authorized to transact business in Alaska and does not have and never has had a registered agent in the state for the receipt of service of process. No agent of Duriron has ever entered the Territory or State of Alaska to solicit and consummate the sale of any Duriron product.

Duriron's products found their way into Alaska in undetermined quantities by various methods. One effective method was through the efforts of Duriron's manufacturer's representative, John T. Doherty & Associates of Seattle. Doherty sent catalogs of Duriron products, printed by Duriron but stamped with Doherty's name, to engineers, architects and plumbers in Alaska. Doherty also sent quotations on any particular job to two Anchorage jobbers, Yukon Supply Company and Susitna Plumbing and Heating. Orders from these sources were sent to Doherty, who forwarded them to Duriron for approval. Upon acceptance a commission was paid to Doherty. Although subsequent in time to the facts which created the issue before us, it does appear from the record that since August of 1963 John Doherty Company has apparently followed the practice of sending a sales representative to Alaska to represent Doherty in selling Duriron products in Alaska.

The record reveals that on a number of occasions Delta Engineering Corporation of Houston, Texas, acting as an independent contractor, sent its purchase orders to salesmen of Duriron located in Houston, for products offered for sale by Duriron, for shipment to Delta in care of

Anchorage Natural Gas Corporation, Anchorage, Alaska; that Duriron would ship the merchandise from Dayton, Ohio to Delta in accordance with instructions, and that payment would thereafter be made to Duriron by Delta.

Vinson Supply Company of Houston, Texas, acting as an independent contractor, on several occasions during 1960, 1961 and 1962, mailed written purchase orders from Houston to salesmen of Duriron also located in Houston, for Duriron products; that Duriron would ship the merchandise from Dayton to Delta Engineering Company in care of Anchorage Natural Gas Corporation, Anchorage, Alaska pursuant to instructions contained in the purchase orders and that the purchase price would thereafter be paid by check from Vinson to Duriron in Dayton.

In April of 1962 and again in March of 1963 Anchorage Natural Gas Corporation ordered merchandise from Duriron directly. These orders were accepted by Duriron. The merchandise was shipped to Anchorage Natural Gas Corporation at Anchorage and remittance was made by the gas corporation to Duriron at Dayton. On the other hand, Duriron refused to accept one order for merchandise mailed by Anchorage Natural Gas Corporation to Duriron in July of 1962.

Duriron summarizes those sales of its merchandise which are known to have reached Alaska in the years preceding the filing of this suit as follows:

In 1958 three Seattle companies purchased products from Duriron costing $5,602.84, and either shipped or caused Duriron to ship the products to a business in Alaska.

In 1959 four Seattle companies purchased products from Duriron costing $982.07, and either shipped or requested Duriron to ship the products to Alaska. In addition, in 1959, Duriron filled orders received directly from one Alaska company and a United States Air Force facility totaling $5,899.75.

In 1960, Seattle and Houston companies made purchases from Duriron totaling $14,717.49, and shipped or requested that Duriron ship the products to a business in Alaska. Also in 1960 one company and a United States Air Force facility made purchases from Duriron totaling $529.32.

In 1961 Seattle, Tulsa and Houston companies made purchases from Duriron totaling $7,404.30, and shipped or requested Duriron to ship the products to Alaska.

In 1962 Houston and Seattle companies made purchases totaling $3,627.06 from Duriron, and shipped or requested that Duriron ship the products to a business in Alaska. Also, in 1962 Duriron filled one unsolicited order received direct from a company in Alaska totaling $630.64.

During the above years Duriron's total gross annual sales in all areas of the world varied between twelve and seventeen million dollars.

It seems agreed that the valve involved in this action arrived in Alaska after Delta Engineering Company, a Texas Corporation acting as agent for Anchorage Natural Gas Corporation, had ordered it along with other merchandise from Vinson Supply Company, also of Texas. Acting as an independent contractor, Vinson had ordered the valve from Duriron for resale. The invoices reveal that the products were to be sent by Duriron directly to Anchorage Natural Gas Corporation in Anchorage.

Since March of 1962 Duriron has maintained a branch office in Seattle, Washington, to serve a sales district covering several northwest states. This sales district was expanded to include Alaska on January 1, 1963.

On the basis of the foregoing facts the trial court found that Duriron did not have the necessary minimum contacts with the State of Alaska and that its courts could not exercise jurisdiction over the corporation. Duriron's motion to quash the summons was granted.

Since the decision of the United States Supreme Court in *Pennoyer* v. *Neff*,[5] the power of state courts to exert jurisdiction over foreign corporations has been steadily expanded by certain landmark decisions. These will be mentioned in the chronological order of their publication.

In *International Shoe Co.* v. *State of Washington*[6] a foreign corporate manufacturer of shoes employed salesmen resident in Washington to solicit orders there. Service of a notice of assessment for unpaid contributions to the state unemployment compensation fund was personally served upon one of the company's solicitors in Washington. A copy was also mailed to the company at its offices in Missouri. On special appearance the company argued that it was not doing business within the state and that it had no agent within the state upon whom service of process could be made. The court emphasized that the activities of the corporation in Washington were continuous and systematic and that its operations resulted in a large volume of interstate business. Also, the company received the benefits and protection of the laws of the state, including the right to use its courts. Such operations were held to establish sufficient contacts with the state ". . . to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.'"[7] The court found that its requirement that the method of service employed must give sufficient notice had been satisfied.

In *Perkins* v. *Beguet Consolidated Mining Co.*[8] the defendant Philippine corporation's gold and silver mining activities had been completely halted by the war. The

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[5] 95 U.S. 714, 24 L. ed. 565 (1878).

[6] 326 U.S. 310, 90 L. ed. 95 (1945).

[7] *Id.* at 320, 90 L. ed. at 104.

[8] 342 U.S. 437, 96 L. ed. 485 (1952).

president, who was also general manager and principal stockholder, maintained a corporation office in his home in Ohio from which he transacted corporate business with the assistance of two secretaries. Substantial corporate accounts were maintained in several Ohio banks, but none of the corporate business concerned any corporate properties in Ohio. The court held that under these facts federal due process would not be violated for Ohio either to take or decline jurisdiction of the corporation where the president had been personally served in Ohio in a suit against the corporation by a stockholder.

In *McGee* v. *International Life Insurance Co.*[9] deceased, a resident of California, had life insurance originally issued by mail by an Arizona company whose obligations had later been assumed by a Texas company. The beneficiary obtained a judgment on the policy in California and sued on the judgment in Texas. The Texas court refused to enforce the judgment on the ground that it was void under the Fourteenth Amendment because service of process outside California could not give jurisdiction to the courts of that state. The Supreme Court reversed the judgment of the Texas court and held that it was sufficient for the purposes of due process that the beneficiary's suit was based on a contract which had a substantial connection with California. Neither insurer had ever had an office or an agent in California, nor had either ever solicited any business in California, or for that matter done any insurance business in California with the exception of the policy there involved.

In *Hanson* v. *Denckla*[10] the United States Supreme Court commented on its previous decisions as follows:

> In McGee the Court noted the trend of expanding personal jurisdiction over nonresidents. As tech-

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[9] 355 U.S. 220, 2 L. ed. 2d 223 (1957).

[10] 357 U.S. 235, 2 L. ed. 2d 1283 (1958).

nological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff . . . to the flexible standard of International Shoe Co. v. Washington. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.[11] [Citations omitted.]

The above mentioned decisions were ably reviewed in the recently decided case of *Gray* v. *American Radiator and Standard Sanitary Corporation.*[12] There an Illinois resident sued for injuries caused by a water heater explosion. A foreign corporation had manufactured the allegedly defective safety valve in Ohio. The valve was assembled into the water heater in Pennsylvania and the heater was eventually sold to the plaintiff consumer in Illinois.

An Illinois statute provided that any nonresident who, either in person or through an agent, committed a tort within the state was considered to have submitted himself to its jurisdiction and could be served personally outside

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[11] *Id.* at 250-51, 2 L. ed. 2d at 1296.

[12] 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

the jurisdiction. The court held that the alleged negligence in manufacture of the valve could not be separated from the resulting injury and that the tort must be considered as having been committed in Illinois.

It then went on to consider the question of whether permitting service outside the state, where the defendant had no agent or employee in Illinois, and where the injury was his only contact with the state, exceeded the limits of due process. In deciding this question it was pointed out that the factor of whether or not the foreign corporation did a substantial volume of business in the state, relied on by the court in *International Shoe* had been minimized as a requirement by the later decision of the United States Supreme Court in *McGee* v. *International Life Insurance Co.*[13] Also, the record before the court did not disclose whether the foreign corporation had done any other business in Illinois.

It was held that the doing of a given volume of business was not the only way in which a nonresident could establish the "minimum contacts" with the state sufficient to support jurisdiction.[14]

In commenting on the lack of evidence of any previous volume of business the court said:

> . . . it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State. To the

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[13] *Supra* note 9.

[14] In addition to McGee v. International Life Ins. Co. the court relied upon Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 2d 664, 666, 25 A.L.R. 2d 1193 (1951), where employees of a nonresident corporation engaged in re-roofing a building for a Vermont resident negligently damaged the building. Service of process was made on the Secretary of State who forwarded it by registered mail to the office of the Massachusetts corporation. The Supreme Court of Vermont held that due process had not been violated and that continuous activity within the state by the nonresident corporation was not a prerequisite to jurisdiction.

extent that its business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves. Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State.

With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.[15]

Although Duriron had no agent in Alaska, to its own knowledge for a number of years it had been satisfying practically every order directed to it from the Alaska market.[16]

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[15] Gray v. American Radiator & Standard Sanitary Corp., *supra* note 12, at 766.

[16] The only known exception would be the refusal to accept the order mailed to Duriron by Anchorage Natural Gas Corporation in July of 1962, which was approximately four months after the explosion which resulted in this suit. As against this refusal, the record shows that Duriron did accept and fill orders submitted direct by Anchorage Natural Gas Corporation in April of 1962, one month following the explosion and again in March of 1963, one year after the explosion.

When compared with Duriron's total gross sales of twelve to seventeen million dollars annually, its known sales of from four to fifteen thousand dollars annually in Alaska might be argued not to be a "substantial volume" of business. On the other hand, when compared with the total market demands of a fledgling economy for specialized industrial products, it is quite likely that Duriron would be found to have been supplying a substantial portion of the total needs of the market, if all of the facts were known. In any event, we agree with Illinois' conclusion in *Gray* v. *American Radiator,* that the volume of business done in the state is not the only method by which the necessary contacts can be established.

In fact, if applied as a fixed test, the dollar volume of business done in the state as compared with the total dollar volume of business done in all areas, could result in a given nonresident corporation being held not to have transacted a sufficient percentage of its total business in the state to have established the minimum contacts, whereas another nonresident corporation with the same dollar volume of sales in the state but with a smaller total of gross sales in all areas, might be held to have established the minimum contacts based on the fact that a greater percentage of its total sales was transacted in the state.

It is not disputed that the flow of Duriron's products to Alaska was continuous from 1958 through 1962, the year in which this suit was commenced. The flow was not "systematic" in the same sense in which that term was used in *International Shoe Co.* to describe the efforts of resident Washington solicitors. Nevertheless, Duriron's response to all orders received, whatever the nature of their origin, seems to have been quite uniform. The orders were all "accepted" by Duriron[17] and shipped to Alaska by Duriron, either directly to the purchaser, or to the independent contractor-purchaser in care of the ultimate

[17] The one exception being that mentioned in note 16 *supra.*

purchaser, the consumer. Catalogs printed and distributed by Duriron for the use of and further distribution by manufacturer's representatives such as John T. Doherty & Associates generated much of Duriron's Alaska business. Duriron is presumed to have been aware of this.

Under these facts we hold that Duriron did derive a benefit from the laws of Alaska which provided a business climate and market demand for its industrial products and which were otherwise available to it for any purpose for which they might be required.

We hold, as did the Supreme Court of Illinois under similar facts[18] that the fact that some of the purchases were made from independent middlemen or that someone other than the manufacturer caused the product to be shipped into the state are not controlling factors.

The doctrine of "estimate of the inconveniences" which would result to the foreign corporation from a trial away from its home has been recognized as one of the tests relevant in determining whether due process would be violated by the exercise of local jurisdiction.[19]

In the case before us the allegedly defective valve manufactured by Duriron, was installed in the gas mains of Anchorage Natural Gas Corporation in Anchorage, Alaska. The explosion occurred at or very near the place of the installation. All of the other defendants, which includes the gas corporation, the contractor, subcontractor and supervisor are located in Anchorage. Most of the witnesses who would testify concerning the allegedly defective valve and its installation and operation with relation to a

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[18] Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

[19] This doctrine was defined and applied by Judge Learned Hand in Hutchinson v. Chase & Gilbert, Inc., 45 F. 2d 139, 141 (2d Cir. 1930) and approved in International Shoe Co. v. State of Washington, 326 U.S. 310, 317, 90 L. ed. 95, 102 (1945), as one of the criteria for determining the question of due process.

claimed lack of certain required couplings are located in this area. It would appear to be far more convenient to Duriron to defend the suits in Alaska than to defend in Ohio and transport all of the witnesses to that state from Alaska. The convenience of the plaintiffs is likewise better served by trial in Alaska for the same reason.

We hold that the nature of the business transacted by Duriron in Alaska was such that the minimal contacts had been established. No violation of due process will result from requiring it to defend these suits.

The order of dismissal entered by the trial court is set aside and the case remanded for further proceedings consistent with the views expressed in this opinion.

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IN THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case No. 62-361

MR. AND MRS. NORMAN BAKKE, ET AL., *Plaintiffs,*

v.

ANCHORAGE NATURAL GAS CORPORATION, ET AL., *Defendants.*

**Order**

This day this cause came on to be heard

(i) on the motions of The Duriron Company, Inc. to quash:

(a) the summons and/or process, dated July 25, 1963,

(b) the amended summons and/or process, dated July 29, 1963,

(c) the supplemental amended summons, dated December 20, 1963,

(d) the supplemental amended summons, dated January 29, 1964,

the service and/or attempted service thereof and the return, if any, heretofore made on said The Duriron Company, Inc., and

(ii) on the memoranda, the affidavits and exhibits attached attached thereto, submitted by the parties, and

(iii) on the evidence contained in and exhibits attached as a part of the depositions of Walter K. Ramage, Warren Bays, George Milne and Clyde Staup taken, and filed heretofore, on behalf of the plaintiffs, and

(iv) on the arguments advanced by the parties.

The Court being fully advised in the premises finds:

1. That plaintiffs file an amended complaint and thereafter caused the issuance of summons, on several occasions, for The Duriron Company, Inc. in attempts to comply with the provisions of Section 10.05.642 of the Alaska statutes;

2. That The Duriron Company, Inc. is a foreign corporation which is not authorized to transact business in the State of Alaska and which has not appointed and does not maintain a registered agent in the State of Alaska;

3. That from the year 1958 to the present time, Independent Contractors, in the furtherance of their own interests and from places of business located outside the State of Alaska, purchased merchandise of The Duriron Company, Inc., and said Independent Contractors thereafter resold the merchandise and shipped or caused the merchandise to be shipped to persons in Alaska;

4. That during the period of five years, 1958 through 1962, three Alaska residents and a facility of the United States Air Force, based in Alaska, mailed five unsolicited orders for goods to The Duriron Company, Inc., which merchandise was furnished by Duriron and represented

93/10,000ths of 1% of the gross sales of The Duriron Company, Inc. during said five-year period;

5. That orders for merchandise of The Duriron Company, Inc., require acceptance outside the State of Alaska before becoming contracts which are binding on The Duriron Company, Inc.;

6. That no agent, servant or employee, acting in the course and scope of employment by The Duriron Company, Inc., entered the State of Alaska or the territory of Alaska at any time heretofore, to solicit or consummate the sale of any products by The Duriron Company, Inc., to any person in the State of Alaska;

7. That The Duriron Company, Inc. does not transact and never has transacted any business in the State of Alaska and service of summons cannot be made on The Duriron Company, Inc. under Section 10.05.642 of the Alaska statutes;

8. That The Duriron Company, Inc. has, at all times, transacted its business in interstate commerce;

10. That by reason of all of the foregoing, this Court is not vested with jurisdiction over The Duriron Company, Inc.;

11. That by reason of the findings, enumerated above, the motion of The Duriron Company, Inc. to quash, aforesaid, should be sustained.

It Is, Therefore, Ordered, Adjudged and Decreed that the motions of The Duriron Company, Inc. to quash the summons, the amended summons and the supplemental amended summons, the service and/or attempted service thereof and the return, if any, shall be, and the same are hereby, sustained.

By reason of the findings enumerated above, notably that said The Duriron Company, Inc. does not transact and has not transacted business in the State of Alaska and that this

Court is not vested with jurisdiction over The Duriron Company, Inc. and is not vested with jurisdiction to issue process for said foreign corporation, it is further Ordered that the above-entitled action, insofar as it asserts claims against The Duriron Company, Inc., shall be and the same is hereby dismissed. The Court costs accrued in these proceedings, as allowed by law, shall be and the same are taxed against the plaintiffs.

APPROVED: Mar. 17, 1964

s/ EDWARD V. DAVIS
*Judge*

ELY, GUESS, RUDD & HAVELOCK

By .....

and

MARSHALL AND SMITH

By P. EUGENE SMITH
*Attorneys for The Duriron Company, Inc.*

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